IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-822

THE RENEGOTIATION BOARD,
Petitioner,

vs.

BANNERCRAFT CLOTHING COMPANY, INC.; ASTRO COMMUNICATION LABORATORY, A DIVISION OF AIKEN INDUSTRIES, INC.; DAVID B. LILLY CO., INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA.

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INTEREST OF THE AMICUS CURIAE.*

This brief is filed on behalf of the Chamber of Commerce of the United States of America, a federation consisting of a membership of over thirty-seven hundred (3700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

* This Brief is lodged with the express written consent of all parties pursuant to the rules of this Court.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to courts' deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters before this Court. *E.g.*, *N. L. R. B.* v. *The Boeing Company, et al.*, 93 S. Ct. 1961 (1973); *N. L. R. B.* v. *International Van Lines*, 93 S. Ct. 74 (1972); *N. L. R. B.* v. *Granite State Joint Board*, 409 U. S. 213, 34 L. Ed. 2d 422 (1972); *N. L. R. B.* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157 (1971); *Boy's Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970); *N. L. R. B* v. *Burns International Security Services, Inc.*, 406 U. S. 272, 80 LRRM 2225 (1972); *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99 (1970); *Sears Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U. S. 655 (1970); and *Los Angeles Herald Examiner* v. *Kennedy*, 400 U. S. 3 (1970).

The instant proceeding is of particular concern to the Chamber's members, as well as to employers generally. In issue are the following important questions:

First, whether a district court has the power or jurisdiction to enjoin on-going agency proceedings until the court is able to review the agency's actions;

Second, whether a district court properly exercises its discretion when it enjoins on-going agency proceedings until the court determines whether parties before the agency are entitled to the documents sought under the Freedom of Information Act which the agency has refused to disclose.

As a corollary to the second issue is the related question of whether an agency's refusal to disclose requested information should be *presumed* to constitute the requisite irreparable harm warranting an injunction of administrative proceedings pending the agency's compliance with its statutory duties of disclosure or a judicial determination that the requested documents should be furnished.

These issues are of practical significance to the Chamber and its members in that such members, both as charged and charging parties, appearing frequently before governmental agencies, have been denied access to certain information subject to disclosure under the Freedom of Information Act and are in continuing jeopardy of future non-disclosure. The tendency of agencies to withhold information causes real injury to private parties whose interests are being adjudicated in an agency proceeding because these parties are unable, without this information, to deal effectively and intelligently with the agency during the proceeding. Because the information is useful only if promptly disclosed during the agency proceeding, it is of great importance to the Chamber and its members that the agency proceeding be enjoined until the agency complies with its statutory duties of disclosure. Moreover, absent immediate injunctive relief by the district court, these agencies would be able to accomplish by delay what they may not lawfully do directly; that is, by engaging in foot-dragging, an agency can postpone disclosure of information which is subject to the Information Act until its usefulness in the underlying agency proceeding has long since expired.

STATEMENT.

In these cases, the Respondents here during litigation before an agency requested the agency to disclose certain information pursuant to the requirements of the Freedom of Information Act, 5 U. S. C. Section 55 *et seq.* (1970) (hereinafter "FOIA"). The agency refused this request claiming that the Act's exemptions applied to the information requested. The Respondents then sought a temporary injunction from a district court in order to stay the on-going agency proceedings and to preserve the *status quo* until the court decided the merits of the FOIA claim. The District Court enjoined further agency proceedings and the Court of Appeals affirmed.

This brief will discuss the following general areas:

First, whether a district court has the power or jurisdiction to enjoin on-going agency proceedings until the court is able to review the agency's actions.

Second, whether a district court properly exercises its discretion when it enjoins on-going agency proceedings until the court determines whether parties before the agency are entitled to the documents sought under the FOIA which the agency has refused to disclose.

While the *amicus* urges affirmance of the case below, the arguments here presented can apply with equal vitality when litigants involved in proceedings before other agencies request documents pursuant to the FOIA and then seek to enforce their claims in district court.

SUMMARY OF ARGUMENT.

A district court has jurisdiction to temporarily enjoin on-going agency proceedings in order to preserve the *status quo* pending judicial review of agency action. This power or jurisdiction is part of the court's traditional means for promoting the administration of justice or is conferred by the All Writs Act, 28 U. S. C. Section 1651(a).

A court is generally asked to use this power by a party who is involved in a controversy with an agency and who, while the agency proceeding is under way, exercises a right to appeal from a preliminary or collateral agency action which nonetheless determines certain of his rights. The appealing party asks the court which will decide the merits of the appeal to enjoin the agency proceedings until the merits of the appeal are resolved so that the court's decision on the merits will not be rendered nugatory because the agency proceeding has advanced and consequently circumstances have changed. While a court has the historic power to grant a temporary injunction, a court also has broad discretion on whether to grant this temporary stay or not.

The district courts have been and will be called upon to decide whether agencies should supply information pursuant to the FOIA to parties involved in agency proceedings. If the party appealing an agency's refusal to supply information requests the court to temporarily enjoin the agency proceeding until the appeal is decided, a court should grant this stay because of the purpose of the FOIA, the great probability that the appeal will be successful, and the irreparable harm that will result if the injunction is not granted and the party is required to continue in the agency proceeding without the requested information to which he is entitled under the FOIA.

The *amicus* will first discuss the general power of an equity court to enjoin on-going agency proceedings and then turn to the application of this power to matters arising under the FOIA.

ARGUMENT.

I. A District Court Has Jurisdiction to Temporarily Enjoin On-going Agency Proceedings in Order to Preserve the Status Quo Pending Judicial Review of Agency Action.

The power of a court in equity such as a district court to grant temporary injunctions in order to preserve the *status quo* pending judicial review of agency action has been long recognized by this Court. An illuminating discussion is provided by the opinion of Justice Frankfurter speaking for this Court in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4 (1942). There, the agency urged that in the absence of specific statutory authorization, a court lacked power to stay the execution of an agency order pending a determination by the court of the merits of an appeal from that order. Justice Frankfurter observed:

> "The power to stay [is] so firmly imbedded in our judicial system, so consonant with the historic procedures of federal appellate courts . . . [it is] part of its traditional equipment for the administration of justice . . ." (at pp. 9 and 13)

This power to stay has been more recently discussed in *Federal Trade Commission* v. *Dean Foods Co., et al.*, 384 U. S. 597 (1965). Here an agency requested that the court grant a temporary injunction to preserve the *status quo* pending the agency's final decision in the case. This Court said that the statute (the Clayton Act) gave reviewing power to the appellate court and this grant included the "traditional power to issue injunctions to preserve the *status quo* while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction." However, power to grant this preliminary relief was not derived from the Clayton Act but rather from the All Writs Act "and its predecessors dating back to the first judiciary act of 1789. Congress has never restricted the power which courts of appeals may exercise under [that] Act." This Court continued:

> "The All Writs Act, 28 U. S. C. Section 1651(a), empowers federal courts to 'issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usage and principles of law.' . . . Decisions of this court 'have recognized a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels . . . such power has been deemed merely incidental to the courts' jurisdiction to review final agency action . . ." (at pp. 603, 604, and 608)

Whether or not an administrative act is final, "depends not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences of such action."[1] A court has jurisdiction to review administrative orders under the All Writs Act when they impose an obligation or

1. *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (CA DC, 1954), cert. denied 347 U. S. 990 (1954), at 55. In *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125 (1939) this Court eliminated the distinction between affirmative and negative orders as a criterion for determining whether an agency action was reviewable, observing that both a negative order retaining the *status quo* and an affirmative order directing change determine a party's rights.

deny a right and the order need not be the last order of the agency.

While in *Dean* an administrative agency sought a temporary injunction, it is reasonable that this Court's observation has equal vitality when a party involved in a controversy with an agency seeks a temporary injunction to preserve the *status quo* pending judicial determination of whether an agency properly imposed an obligation or denied a right. *Scripps-Howard, supra.*

The lower courts have recognized that a court of equity such as a district court has an inherent power to enjoin agency proceedings pending judicial review of agency action. The Court of Appeals for the District of Columbia stated that under the All Writs Act courts have the power to "grant an injunction during pendency of an appeal or to make any order appropriate to preserve the *status quo* or the effectiveness of the judgment subsequently to be entered." *Application of President and Directors of Georgetown College, Inc.*, 331 F. 2d 1000, 1005 (CA DC, 1964), *cert. den.* 377 U. S. 978 (1964).

In *Isbrandtsen Co.* v. *United States, supra,* a court issued a temporary injunction against the Federal Maritime Board's interim approval of a rate system pending a formal hearing. While the Board's approval was only interim, the court reasoned that the rate system had an immediate effect upon the petitioner and therefore was final for the purposes of review.[2]

These cases illustrate the lower courts' recognition of this Court's observation in *Scripps-Howard* that the power to issue a temporary injunction to preserve the *status quo* pending judicial review of an agency's action is "as old as the judicial system of the nation." (at 17).

Whether this power in equity courts is based upon the All Writs Act or upon the inherent power to "do all things that are reasonably necessary for the administration of justice within the

2. For cases holding similarly see *Eastern Greyhound Lines* v. *Fusco*, 310 F. 2d 623 (CA 6, 1962) and *Isbrandtsen Co.* v. *United States*, 81 F. Supp. 544 (SDNY, 1948).

scope of its jurisdiction, and for the enforcement of judgments and mandates [,] . . ."[3] only an express Congressional directive can divest the courts of this jurisdiction. As this Court has recognized: "We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329 (1944).

Therefore, when a statute is silent on whether or not a district court can enjoin temporarily on-going agency proceedings, this statutory silence in no way implies that the court lacks the traditional equity power to protect its jurisdiction by issuing a temporary injunction. As this Court observed in *Scripps-Howard, supra* "the search for significance in the silence of Congress is too often the pursuit of a mirage." Congress did not expressly authorize stay orders, but a "denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxilliary powers to federal courts . . . Where Congress wished to deprive the courts of this historic power, it knew how to use apt words . . ." (at pp. 11 and 17).

The more general principles set out above can be applied to the statute here under consideration, the FOIA. Thus, while the FOIA is silent on whether district courts have jurisdiction to temporarily enjoin on-going agency proceedings, this silence should not deprive the courts of their traditional equity powers. The FOIA gives these courts exclusive jurisdiction to review and enforce claims for information brought under that statute. If the court lacks the power to temporarily stay the agency proceeding while it reviews an FOIA claim, its ruling on the merits of that claim may well occur only after the agency proceedings have far advanced or concluded so that while the court may find the claim has merit, this ruling will be nugatory to the interested party. To protect their jurisdiction to enforce FOIA claims, that is, to make their rulings effective to con-

3. *Morrow* v. *District of Columbia*, 417 F. 2d 728, 737 (CA DC, 1969).

cerned parties, a district court also must have power to enjoin on-going agency proceedings until the court is able to review and decide the merits of the FOIA claim.

II. A District Court Properly Exercises Its Discretion When Its Enjoins On-going Agency Proceedings Until the Court Determines Whether Parties Before the Agency Are Entitled to the Documents Sought Under the FOIA.

While it is well established that a district court has the power or jurisdiction to enjoin on-going agency proceedings until judicial review of agency action can occur, it is also true that it is within the court's discretion whether to exercise this power or not. Before discussing the variables which determine when it is appropriate for a court to exercise its power to temporarily stay on-going agency actions, it is well to distinguish between the doctrines of exhaustion of administrative remedies and interim relief.[4] While failure to make this distinction will not necessarily yield an improper result since, as will be seen, irreparable harm is a factor common to both doctrines, if the distinction is made in judicial decisions these decisions will not only have greater precedential value but also will help eliminate the confusion that exists between the two doctrines. Guidelines from this Court will therefore be extremely helpful.

A. The Doctrines of Exhaustion and Interim Relief Distinguished.

Briefly, while there is uncertainty in this area, the exhaustion doctrine appears to be correctly limited to cases where judicial review on the merits of an agency decision is sought before the agency has had a chance to complete its own procedures and to make a determination on the merits. A party seeking interim relief, however, as in the instant case, does not ask the court to judge the merits of the main agency proceeding, but rather seeks to temporarily enjoin that proceeding until the

4. *Murry* v. *Kunzig*, 462 F. 2d 871 (CA DC, 1972).

court can review on appeal an agency decision which, though preliminary and perhaps collateral to the main proceeding, effects with finality a party's rights. The party seeks to preserve the *status quo* so that he will not suffer irreparable injury by being required to continue in the main agency proceeding before the court can review and decide his appeal. A court granting this interim relief preserves as much as possible the *status quo* so that when it later decides the appeal, its decision will be meaningful to all parties and not rendered nugatory because the main agency proceeding has continued and circumstances have consequently changed. Following judicial determination of the appeal, the temporary injunction is lifted and the main agency proceeding can go forward to its conclusion.

As will be seen below, if a party requests information under the FOIA and the agency refuses this request, this refusal, though preliminary or collateral to the main agency proceeding, nonetheless immediately effects with finality the party's rights. Therefore, when a district court is asked to enjoin agency proceedings until it determines whether the party before the agency is entitled to information sought under the FOIA, the case appears to fall within the doctrine of interim relief rather than within the exhaustion doctrine. The party seeking the temporary stay is not asking the court to judge the merits of the main proceeding before the agency, but rather is asking the court to preserve the *status quo* until his claim under the FOIA is resolved so that he will not suffer irreparable harm by being required to continue in the agency proceeding before resolution of this claim. However, because of the judicial confusion between these two doctrines, this brief will first discuss the applicability of the interim relief doctrine to FOIA claims and then discuss the applicability of the exhaustion doctrine to these claims.

B. Under the Doctrine of Interim Relief a District Court Properly Exercises Its Discretion When It Enjoins On-going Agency Proceedings Until the Court Determines Whether Parties Before the Agency Are Entitled to the Documents Sought Under the FOIA.

In determining whether to exercise its power and enjoin on-going agency proceedings until it resolves claims made under the FOIA, a court can well consider the following factors:

First, is it likely that the party seeking the injunction will thereafter be successful in obtaining the requested information by order of the district court?

Second, will the party seeking the injunction be irreparably harmed if the injunction does not issue?

Third, would issuing the temporary injunction further the public interest?[5]

These factors are relevant not only to the instant case but also to other proceedings before other agencies where parties involved in litigation before these agencies seek to enforce in district court claims under the FOIA.

To evaluate the application of these factors to claims under the FOIA, it is first necessary to determine how that Act should be interpreted by the courts. The answer is apparent from the purposes of the Act, from its legislative history and from its explicit provisions.

The intent of Congress in drafting the FOIA was to establish a rule of general disclosure of agency information. This is apparent from the legislative history and from the provisions of the Act which require that the agency refusing to disclose information has the burden to prove that its refusal was proper because the requested information was exempted from disclosure

5. Compare *Virginia Petroleum Jobbers Association* v. *Federal Power Commission*, 259 F. 2d 921 (CA DC, 1958).

under specific statutory language. Sec. 552(b), (c), Sec. 553(a)(3).[6]

The purpose of the Act is expressed in a Report of the Senate Judiciary Committee:

> "Knowledge will forever govern ignorance and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

Prior to the passage of the FOIA, agencies could withhold information from the public or aggrieved parties asserting that withholding was "in the public interest." There was no provision for judicial review of an agency's decision to withhold information. J. Katz, *The Games Bureaucrats Play*, 48 Texas L. Rev. 1261 (1970).

The Senate Report states "Innumerable times it appears that information was withheld only to cover embarrassing mistakes or irregularities. . ." (S. Rep. No. 813 at 3.) Section 552(c) was promulgated "to eliminate the loopholes which allowed agencies to deny legitimate information to the public and to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." (S. Rep. No. 813 at 3.) The purpose of Section 552(c) "is to make it clear beyond doubt that all materials of the government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions of subsection (b)." (S. Rep. No. 813, 10.)

The FOIA, then, was to be a rule of full agency disclosure. It is wholly consistent with this purpose that not only the "public" but also private parties involved in proceedings with an agency receive the benefits of disclosure bestowed by the Act. It is these parties, rather than the general public, who

6. *Legal Aid Society* v. *Schultz*, 349 F. Supp. 771 (U. S. D. C. N. D., California, 1972).

will be most often victimized by an agency's "embarrassing mistakes or irregularities." These irregularities and errors will go unnoticed and unremedied and may adversely affect significant rights, unless information is available to the parties involved in the agency proceeding.

The Senate manifested a direct concern for *parties* involved in controversies with an agency:

> "requiring the agencies to keep a current index of their orders, opinions, etc. is necessary to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies. This change *will prevent a citizen from losing a controversy with an agency* because of some obscure and hidden order or opinion which the agency knows about but has been unavailable to the citizen simply because he had no way in which to discover it. . ." (S. R. No. 813 at 7.)

The House, too, displayed its concern for the rights of plaintiffs who, when involved in agency proceedings, seek information from the agency:

> "Information sought by *plaintiffs* from Government is likely to be a perishable commodity and . . . delays . . . may result in substantive damage to *plaintiff's case*. In some circumstances, such foot-dragging in the courts can render the information totally useless, if and when it is ever made available by the Federal bureaucracy." (Emphasis added) (H. R. No. 92-1419, 92nd Cong. 2nd Sess. 2 (1972))

Thus, Congress quite clearly foresaw and intended the application of the Information Act in pending matters. In addition, H. R. No. 1497, 89th Congress, 2d Sess. 8 (1966) stated:

> ". . . a final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if . . .
>
> "(i) it has been . . . made available or published as provided by this paragraph . . ."

The *right to know* then was accorded to both plaintiffs and defendants in an agency proceeding and to the public at large.

Because the FOIA mandates full agency disclosure and imposes upon the agency the burden to prove non-disclosure is proper, it is highly probable that a party in controversy with an agency will be successful in obtaining the requested information by order of the district court when this information is readily and specifically identified or identifiable. But if this success is not to be illusionary and the information totally useless, it must be furnished to the requesting party before the agency proceeding has been completed or has far advanced and before the agency views have been fixed. That is, the information will enable a party effectively and intelligently to deal with an agency only if it is produced when the agency proceeding has not far progressed. Therefore, it makes sense to enjoin the agency proceeding until the agency furnishes the requested information either voluntarily or pursuant to order of the district court. The alternative is to require a litigant involved in an agency proceeding who has been denied information by the agency to pursue simultaneously two parallel courses of litigation,—his suit for information in the district court and the underlying agency proceeding itself. However, while he continues in the agency proceeding he does not have access to the information and is therefore unable to knowledgeably deal with the agency. This is a situation that the FOIA sought to correct. Therefore, it is entirely consistent with the Act's philosophy and purpose that the agency proceeding be stayed while the claim under the FOIA is being resolved. In this way, consistent with the intent of that Act, a party will not be required to continue in an agency proceeding until he has access to information that will enable him to deal effectively with the agency.

However, because courts of equity have required a showing of irreparable harm prior to issuing temporary restraining orders, it is necessary to determine what is required to establish irreparable harm in cases arising under the FOIA. Because, con-

sistent with the purpose of the FOIA, a party should not be required to continue in an agency proceeding until he has information properly disclosable under the Act, it is apparent that the agency proceeding must not proceed when the agency has refused to disclose information relevant to the adjudication of a party's legitimate interests. Consequently, the initial refusal to disclose information should be presumed to constitute the requisite injury warranting injunctive relief to stay the Agency's proceedings pending the resolution of the FOIA claim. This presumption is particularly justified when a party is dealing with agencies which make significant decisions which effect with finality a party's rights and which are not reviewable by any court.[7]

There are further justifications for this presumption:

First, a party engaged in proceedings before an agency cannot be reasonably expected to *prove* that the non-disclosure of the specific contents of documents causes him irreparable harm when he has had no opportunity to inspect these documents.

Second, the injury to a party's interest which results from an agency's refusal to disclose information promptly is inherently

7. The General Counsel of the National Labor Relations Board is such an agency and *Sears, Roebuck and Co. on its own behalf and on behalf of other charging parties under the National Labor Relations Act, Petitioner,* v. *National Labor Relations Board and Eugene G. Goslee, Acting General Counsel, in his own behalf and as agent for the National Labor Relations Board, Respondents.* On petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. (No. 72-1503), presents the question as to what an aggrieved party need establish to render himself entitled to an injunction staying the General Counsel's proceeding pending that agency's compliance with its obligations under the FOIA. The Court of Appeals found that absent a showing of irreparable injury such an injunction is not warranted. In seeking certiorari, the Petitioner is contending that when the General Counsel refuses to make available to parties involved in his proceedings, documents constituting his final decisions and relevant to the current proceeding, such unlawful non-disclosure should be *presumed* to result in irreparable injury warranting immediate injunctive relief, staying the proceeding pending the General Counsel's compliance with his duties of disclosure under the FOIA.

irreparable. Even if an appellate court were to rule that the information improperly withheld denied the aggrieved party a fair hearing, the remand to the agency for a new hearing is wholly inadequate relief. In many agency proceedings, when the remand occurs only after an extended period of time has passed, witnesses necessary to the party will be unavailable or their memories will have dimmed with the pass of time so that even furnished with the information initially requested, a party's chance to successfully prosecute or defend his case in the second hearing is severely diminished. He may well lose the controversy because the information was initially denied and nonetheless the agency proceeding continued. This is precisely what Congress intended to preclude by the FOIA. In addition, the second hearing which could have been avoided if the district court enjoined the agency proceedings until it determined whether the party was entitled to the information sought under the FOIA, will be largely a duplicate in terms of time and expense of the first hearing. The avoidance of such duplicative and repetitive proceedings is an approved objective of our legal system.[8]

While in *Myers* v. *Bethlehem Shipbuilding Corp., Ltd.*, 303 U. S. 41 (1938) this Court observed that:

> ". . . [T]he rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage[,]" at 51-52.

the significance of this observation should not be overstated but rather confined to the facts of the case and the time of the decision. When *Myers* was decided, agencies were new and fighting for their lives and therefore judicial protection was legitimate and consistent with Congressional purpose.[9] In addi-

8. *U. A. W.* v. *Scofield*, 382 U. S. 350 (1965).

9. Jaffe, *Judicial Control of Administrative Action*, 1965, pp. 432-435.

tion, the issue in *Myers* was whether the business operation of an employer affected interstate commerce, a question of fact which required agency expertise and discretion to resolve. However, in dealing with issues arising under the FOIA other counterbalancing considerations arise. For one thing, the resolution of a claim brought under the FOIA does not require agency expertise or discretion, but only judicial interpretation of that Act. Therefore, there is no necessity to withhold interim relief out of respect for agency expertise. For another, the concern of Congress has shifted from agency independence to the protection of the rights of individuals involved in controversies with an agency. Congress was concerned that a private party would lose a controversy with an agency because of information which the agency utilized but which was denied to the party. Consistent with this concern, this Court should not require an individual to advance through even one agency proceeding unless he possesses the information to which he is entitled pursuant to the terms of the FOIA and with which he can argue on even terms with the agency. To accomplish this end, and to act consistent with Congressional concern, this Court should permit district courts to enjoin on-going agency proceedings pending the agency's compliance with the directives of the FOIA.

Additionally, when issues arise under the FOIA, the temporary injunction will further the public interest. Because the FOIA is to be a rule of full agency disclosure, not only to the public but also to persons involved in controversies with an agency, and because agencies have been known to refuse requests for information made pursuant to the Act, immediate injunctive relief until the FOIA claim is resolved is wholly consistent with public policy. This temporary injunction will not affect the agency's main proceeding or encroach upon its statutory jurisdiction. Such an injunction will, however, discourage future agency procrastination in disclosing information and will compel respect for the purpose of and the philosophy behind the Act.

C. Under the Doctrine of Exhaustion, a District Court Properly Exercises Its Discretion When It Enjoins On-going Agency Proceedings Until the Court Determines Whether Parties Before the Agency Are Entitled to Documents Sought Under the FOIA.

Among the factors generally considered in determining whether administrative remedies must be exhausted are the availability of these remedies to the aggrieved party and whether he will suffer irreparable harm if the court does not intervene and enjoin agency action.

In the instant case, as correctly found by the court below, there are no administrative remedies under the FOIA.

> "Once a party has properly requested information from an agency, he has exhausted all the administrative avenues of relief which the Act provides." 466 F. 2d 345 (1972) at page 358.

This quotation is applicable to agencies other than the Renegotiation Board. A district court has exclusive jurisdiction to determine the merits of claims under the FOIA and to order the production of wrongly withheld information. For example, when a party before the General Counsel of the National Labor Relations Board requests information from and is refused by the General Counsel he has no administrative avenue to follow to seek the information because the *Board* is not empowered to review the General Counsel's refusal to furnish information.[10] Accordingly, when the General Counsel refuses to provide in-

10. Section 102.31 of the Board's Rules and Regulations empowers the Board to subpoena only evidentiary matter, not information, and moreover, it is the General Counsel, the defendant in an FOIA suit, who is empowered to enforce this subpoena. This argument is relevant to Petitioner's position in *Sears, Roebuck and Co. on its own behalf and on behalf of other charging parties under the National Labor Relations Act, Petitioner,* v. *National Labor Relations Board and Eugene G. Goslee, Acting General Counsel, in his own behalf and as agent for the National Labor Relations Board, Respondents.* On petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. (No. 72-1503).

formation pursuant to a request under the FOIA, a party has exhausted all the administrative avenues of relief which the Act provides. The only remaining remedy is an action in the district court.

Therefore, administrative remedies are lacking under the FOIA. In addition, for reasons stated in Part B of this brief, when an agency disobeys the express statutory directive and refuses to produce requested information, this non-disclosure should as a matter of law constitute a presumption of irreparable harm warranting the district court to exercise its power and enjoin on-going agency proceedings until the agency complies with the request for information or until the status of the requested information is determined.

D. Myers v Bethlehem Shipbuilding Corp. Does Not Compel a Contrary Result.

An examination of *Myers* v. *Bethlehem Shipbuilding Corp., supra,* and cases decided by this Court after *Myers* lead to the conclusion that exhaustion of remedies is not required when a district court is called upon to decide questions of statutory interpretation but, instead, is required when the court faces questions involving administrative expertise or agency discretion.[11] This distinction becomes clearer when such cases as *Leedom* v. *Kyne,* 358 U. S. 184 (1958); *Boire* v. *Greyhound Corp.,* 376 U. S. 473 (1964), and *McKart* v. *United States,* 395 U. S. 185 (1969) are compared with *Myers.* In *Myers,* the petitioner employer requested that the district court stay further NLRB hearings because the employer's business did not affect interstate commerce and therefore the Board had no jurisdiction to proceed. In denying the petitioner's request this Court observed that to allow the injunction would ". . . in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively

11. Davis, *Administrative Law Treatise,* Section 20.01 (1970 Supplement).

should hear and determine in the first instance." *Myers* at page 50. *Myers* then involved the factual determination of whether an employer's business affected interstate commerce. In order to make this determination the district court would have to evaluate the facts of the particular case rather than simply interpret a statute and the evaluation of these facts required the expertise that the Board is supposed to possess.

In *Leedom, supra,* however, the National Labor Relations Board, contrary to express statutory command, included professional employees in a bargaining unit with non-professionals without the approval of the former. This Court stated:

> "The sole and narrow question presented is whether a Federal District Court has jurisdiction of an original suit to vacate [a] determination of the Board because made in excess of its powers." at 185.

Observing that the purpose of the suit was to strike down an order of the Board made "in excess of its delegated powers[,] . . ." and that the order deprived professional employees of a statutory right, this Court found that the district court had jurisdiction to enjoin the agency's proceedings.

However, in *Boire* v. *Greyhound Corp., supra,* this Court held that a district court could not enjoin a National Labor Relations Board election where the petitioner claimed that the Board improperly determined the bargaining unit's composition. This Court observed that the National Labor Relations Act provides review procedures by the Board and the Courts of Appeals for election cases. *Kyne* and *Boire* can be reconciled. While *Kyne* did not speak of the exhaustion of administrative remedies, that case involved a legal issue of statutory interpretation while in *Boire,* the determination of the bargaining unit's composition required the expert evaluation of facts which the Board is said to be able to provide.

The distinction between issues involving statutory interpretation on the one hand and agency discretion or expertise on the

other is highlighted by *McKart, supra.* There the issue was whether an individual defending a criminal prosecution for refusing to submit to military induction is barred by the exhaustion doctrine from challenging the validity of a reclassification order because he did not take an administrative appeal from that order. No issue of administrative expertise was raised. This Court was called upon to interpret a statute and did so holding McKart was exempt from military service as an only surviving son. This Court observed that when agency expertise is necessary, it might be proper to require an individual to carry his case through the administrative process before he comes to court but where the only issue is statutory interpretation governmental interest in requiring exhaustion did not outweigh the burden to McKart because exhaustion would bar him from obtaining judicial review from the administrative order. While the *McKart* holding may in part have been based upon the hardship of going to jail without judicial review of an administrative order if exhaustion were applied, the distinction between questions involving statutory interpretation and those involving an evaluation of facts and administrative expertise is sound when *McKart* is compared with *Myers* and the other cases cited in this subsection.[12]

The lower courts have recognized and followed this distinction. For example, in *Leedom, et al.* v. *Norwich, Connecticut Printing Specialties & Paper Products Union, Local No. 494, et al.*, 275 F. 2d 628 (CA DC, 1960), *cert. den.* 362 U. S. 969 (1960) the court stated that if the National Labor Relations Board disregarded any statutory limitation on its discretion and thereby denied employees a statutory right, the district court should be upheld in granting a temporary injunction staying a representation election. However, if the Board merely exercised its discretion in resolving issues of fact to determine an appropriate bargaining unit, the district court

12. Davis, *Administrative Law Treatise,* Section 20.10 (1970 Supplement).

erred in enjoining the election. Similarly, in *Elmo Division of Drive-X Company* v. *Dixon*, 348 F. 2d 342 (CA DC, 1965) the plaintiff sought to enjoin the F. T. C. from continuing with a complaint proceeding because a consent decree in an earlier case required the Commission to proceed by reopening the case. The court of appeals distinguished *Myers* because the plaintiff in *Elmo* did not object to the Commission making factual decisions but only to the procedure the Commission chose in making them. The court remanded the case to the district court, strongly implying that an injunction against the Commission would be proper. In *Goodrich* v. *Federal Trade Commission*, 208 F. 2d 829 (CA DC, 1953) a district court properly enjoined an agency from enforcing a rule because the promulgation of this rule exceeded the agency's statutory authority. In *Jewel Companies, Inc.* v. *Federal Trade Commission*, 432 F. 2d 1155 (CA 7, 1970) an injunction was held to be proper where the Commission exceeded its statutory authority. The court in *Jewel* distinguished *Myers* v. *Bethlehem, supra*, on the basis suggested here.

Because suits by a party in district court to enforce claims under the FOIA do not involve questions of agency expertise or discretion but only questions of statutory authority or interpretation there is no need for the district court to require the exhaustion of administrative remedies even if such remedies exist. Thus, *Myers* does not conflict with the conclusion that a district court may assert its jurisdiction and exercising its discretion issue an injunction to temporarily stay the agency's proceedings until the court determines whether litigants before the agency are entitled to the information they seek pursuant to the directives of the FOIA.

E. Though Claims Pursuant to the FOIA Are Collateral to the Main Agency Proceeding, the District Courts May Enjoin the Main Agency Proceeding Until the FOIA Claims Are Resolved.

While the issues in the cases cited in Part D, above, involved the interpretations of an agency's enabling statute or agency expertise and while suits to enforce claims under the FOIA may be considered collateral to the main agency proceeding, this distinction should not prevent district courts in their discretion from enjoining agency proceedings until FOIA claims are resolved. The preliminary injunction granted by the district court will not change the ultimate power of the agency (whether the Renegotiation Board or other agency) to decide all questions within its statutory jurisdiction. The injunction however, does implement the Congressional intent by promoting agency respect for the directives of the FOIA because absent this injunctive relief an agency can delay disclosure while its proceedings continue so that the information when furnished is useless to the aggrieved party. While the interim injunction will delay agency proceedings pending resolution of the FOIA claim, this delay is simply the necessary consequence of the overriding Congressional concern for a party involved in an agency proceeding. Congress, by the FOIA, has decreed that such a party must have access to information that the agency uses to determine his rights before the agency proceeding advances, so that he will not lose a controversy with an agency because he does not have the relevant information relied upon by the agency and so that he will be able effectively to raise issues of fact or law before the agency has crystalized its views or made a decision.

CONCLUSION.

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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